No. 10,941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition for Naturalization of

FONG CHEW CHUNG.

FONG CHEW CHUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
JAMES T. DAVIS,
Assistant United States Attorney,
R. B. MCMILLAN,
Assistant United States Attorney,
Post Office Building, San Francisco 1,
Attorneys for Appellee.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the District Court of the United States for the Northern District of California, Southern Division, denying appellant's petition for naturalization. (Tr. 33-38.) The Court below had jurisdiction under the provisions of 8 U.S.C. 701 (a). The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. Section 225 (a).

STATEMENT OF THE CASE.

On April 29, 1944 appellant filed in the District Court of the United States for the Northern District of California, Southern Division, his petition for naturalization. (Tr. 3-6.) A hearing was held in the Court below on May 1, 1944. (Tr. 7-33.) On May 22, 1944 the Court below made its order denying appellant's petition for naturalization. (Tr. 33-38.) On May 31, 1944 appellant filed a petition for reconsideration. (Tr. 38-39.) On September 5, 1944 the Court below made its order denying appellant's petition for reconsideration of the previous order. (Tr. 39-43.)

STATEMENT OF FACTS.

The petitioner is a native and citizen of China, lawfully admitted to the United States in 1927. On December 18, 1942 he was inducted into the military services and was honorably discharged from the United States Army on August 5, 1943. The following notation appeared on the discharge: "Section VIII A.R. 615-360. Ineligible for reenlistment or induction". The Court below found that the petitioner, although a resident in this country for seventeen years, and engaged in business in San Francisco as part owner in a Chinese grocery, does not speak or read English and knows nothing about our form of government. His testimony was taken through an interpreter. (Tr. 34-35.) The Court further stated, in its opinion on denial of petition for reconsidera-

tion, that, in its opinion, the appellant either practiced a fraud upon the Government by assuming an attitude of "Me no sabe" in order to get out of the Army, or was just "plain dumb". That in either case he would not be entitled to citizenship. (Tr. 42.)

THE QUESTION.

The sole question presented by this appeal is whether a petitioner for naturalization otherwise qualified, who has been honorably discharged from the military or naval forces has "served * * * honorably" within the meaning of Section 1001, Title 8 U.S.C. (Title XI, Second War Powers Act of 1942).

STATEMENT OF THE LAW.

The statute under which the appellant filed his petition for naturalization reads in part as follows:

> "§1001. *Exception from certain requirements.*
>
> Notwithstanding the provisions of sections 703 and 726 of this title, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States, including its Territories and possessions, shall have been at the time of his enlistment or induction a resident thereof, may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention and no period of residence within

the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting or meet any educational test; * * *."

(Title 8 U.S.C. Section 1001.)

The pertinent provisions of Section VIII Army Regulations 615-360 read (27):

"INAPTNESS OR UNDESIRABLE HABITS OR TRAITS OF CHARACTER

"51a. Procedure. * * * When an enlisted man—

(1) Is inapt, or

(2) Does not possess the required degree of adaptability for the military service after reasonable attempts have been made to reclassify and reassign such enlisted man in keeping with his abilities and qualifications, or

(3) Gives evidence of habits or traits of character * * * which serve to render his retention in the service undesirable, and rehabilitation of such enlisted man is considered impossible after repeated attempts to accomplish same have failed, or

(4) Is disqualified for service, physically or in character, through his own misconduct, and cannot be rehabilitated so as to render useful service before the expiration of his term of service without detriment to the morale and efficiency of his organization, his company or detachment com-

mander will report the facts to the commanding officer."

"55.

a. Except as otherwise prescribed in b below, the discharge from the Army of the United States (blue) will be given.

b. An honorable discharge from the Army of the United States will be given when, according to the approved findings of the board of officers required by paragraph 51c, the conduct of the enlisted man during his current period of service has been such as would render his retention in the service desirable were it not for his inaptitude or lack of required adaptability for military service. In such cases the discharge certificate will show that re-enlistment is not warranted."

The stated policy of the War Department in proceedings for discharge appears in paragraph 52a:

"No man will be separated from the service prior to the expiration of his term of service for any of the causes enumerated in paragraph 51a unless the Government can obtain no useful service from him by reason of his mental, moral, or physical disqualification once such man has been accepted for service as an enlisted man in the Army of the United States." (28)

DISCUSSION.

As this is a case of first impression involving the interpretation of a statute and because questions of governmental policy are involved, we referred the

matter to the Attorney General. We are in receipt of opinions from the office of the Judge Advocate General of the Army, the Immigration and Naturalization Service, the Attorney General and the Solicitor General with the request that we make the views of these departments known to this Honorable Court.

The Judge Advocate General adopts the position that the War Department has the sole authority to determine administratively the character of the service rendered by a member of the Army and that its findings are final and conclusive and not subject to review by the Courts. (Citing *United States v. Kelly,* 15 Wall. 34, 36, 21 L. Ed. 106, in which the Supreme Court quoted with approval an opinion of the Judge Advocate General holding that an honorable discharge is "a formal, final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a status of honor * * *" and *Nordman v. Woodring,* 28 F. Supp. 573 (W.D. Okla., 1939); *Davis v. Woodring,* 111 F. (2d) 523 (App. D.C., 1940).

We wish to state that the lower Court clearly recognized this principle of law and did not question its validity. The Court was careful to point out that it did not claim the jurisdiction to usurp the power of the War Department nor did it question the status of petitioner as the holder of an honorable discharge but, granting this, that the possession of an honorable discharge is not a final and conclusive finding that the

person possessing it has "served honorably" within the contemplation of the statute. (8 U.S.C. 1001.)

The Court said:

> "The second ground calls the attention of the court to the statement on petitioner's honorable discharge: 'This certificate is awarded as a testimonial of Honest and Faithful Service to his country.' I considered the effect of these words in making the decision. I concluded that when construed with petitioner's record while an enlisted man and the Army Regulation governing his discharge, these words were ineffective and not binding on the court so far as concerns the present proceeding. The very reason for the discharge as set forth in petitioner's army record negatives the idea that petitioner has served in any way within the contemplation of the statute. I am mindful of the fact that the army has issued to applicant a paper designated as an honorable discharge. It speaks for itself so far as applicant's separation from the army is concerned, but its language does not per se entitle the bearer to citizenship. Only the law can do that, and quite clearly the law is against the applicant. * * *
>
> It appears on the face of petitioner's discharge that it was awarded under the provisions of Section VIII of Army Regulations 615-360. By examining the regulations referred to, the court was not questioning the action of the War Department but attempting to determine the circumstances under which the discharge was granted as shown by the reference on the discharge itself. It was found that an honorable

discharge is granted under these regulations only when the Government can obtain no useful service from a soldier."

The Immigration and Naturalization Service, calling attention to the legislative history of Bill S. 2208,* which became the statute in question (8 U.S.C. 1001), believes, in brief, that the statute should be liberally construed in favor of the alien and that possession of an honorable discharge should be construed as conclusive evidence that the applicant has "served honorably".

The legislative history of the statute indicates that it is a "similar bill" to the one had during World War I and is "almost identically based on legislation we had in the last war" and "carries forward the policy" of that bill. But the present legislation surpasses the antecedent law in liberality and generosity. The Service indicates that the changes made by the present law with respect to aliens serving in the army are revolutionary. For example, for the first time in the history of the naturalization laws provision is made for the extra-judicial bestowal of naturalization through the medium of executive or administrative officers in the case of aliens who are not within the jurisdiction of any naturalization Court; educational qualifications are dispensed with

*Senate Report 989 (2d Sess. 77th Cong.). Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong. (2d Sess. Serial No. 10).

and otherwise racially ineligible aliens are made eligible.

Similar legislation during World War I (Act of July 19, 1919 (41 Stat. 222) used the phrase "honorably discharged" rather than "served honorably" and it is the opinion of the service that the present Congress intended to liberalize rather than restrict the method of naturalization of members of the armed forces.

The Attorney General adopts the views of the Judge Advocate General and of the Immigration and Naturalization Service and further points out, in discussing the similarity between the present legislation and that of World War I, that the previous legislation (Act of July 19, 1919 (41 Stat. 222)) was retrospective and, hence, used the phrase "honorable discharge" whereas the present law is designed to favor the naturalization of aliens who had served, were serving or thereafter served honorably in the military forces and that, hence, an honorable discharge could not have been made the basis for qualification.

He also advances a plausible explanation for the use of the phrase "served honorably" in the statute rather than "honorable discharge", even in the case of those who had completed their service, because of the variation in the types of discharges in use by the several branches of the military and naval forces. The Navy, for example, provides for a discharge "under honorable conditions", as opposed to an "honorable discharge" even for disability incurred in line of

duty, where the veteran's record of marks as to proficiency or conduct are below a certain arbitrary standard. Manifestly, in the case of a veteran so discharged, he should be entitled to the benefits of the naturalization statute even though his discharge was "under honorable conditions", rather than an "honorable discharge". However, as pointed out by the Solicitor General there is no evidence supporting this position in the legislative material.

Finally, the Attorney General states that from a practical standpoint, if the Courts were allowed to follow the principle laid down in this, the first case interpreting the statute, and to go behind certificates of honorable discharge issued by the Army and Navy so as to find, independently, what was the character of service rendered by the petitioner, it can be foreseen that there may be as many interpretations as there are Courts; and that the fair and impartial administration of the law would be hampered appears to be obvious.

The Solicitor General has reviewed the recommendations of the other Departments to the effect that a certificate of honorable discharge should be conclusive as to the honorable character of the holder's services in the armed forces. The arguments in support of their position may be summarized as follows:

(1) The legislative history, particularly statements of the Attorney General during the hearings before the House Judiciary Committee, that the provision was based upon World War I legislation under

which the test was honorable discharge, not honorable service; (2) considerations of policy, particularly the policy of leaving to the War and Navy Departments the final appraisal as to whether the veteran's service has been honorable or not; and (3) the administrative difficulties which would be involved in making judicial inquiry in every case into the character of the service rendered by honorably discharged veterans.

The Solicitor General states that the interpretation urged by the various Departments is more reasonable and more desirable as a matter of Government policy but feels nevertheless that the statute is ambiguous and that there is room for judicial construction. He recommends that the Government file a memorandum setting forth fully and fairly all of the considerations relevant in construing the statute and urging that the Circuit Court of Appeals adopt the construction that a certificate of honorable discharge is conclusive as to the honorable character of the alien's military service.

CONCLUSION.

While we agree with the lower Court that the great gift of citizenship should not be lightly bestowed and that, in some instances, of which the instant case is a good example, undeserving persons will be admitted to citizenship because they hold an honorable discharge from the military service which may have been granted them for reasons other than those usually considered as being tests of good citizenship, we feel constrained,

because of the apparent legislative intent as well as for reasons of governmental policy, to urge this Honorable Court to adopt the construction that a certificate of honorable discharge is conclusive as to the honorable character of the alien's military service.

Dated, San Francisco,
March 5, 1945.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

JAMES T. DAVIS,
Assistant United States Attorney,

R. B. MCMILLAN,
Assistant United States Attorney,

Attorneys for Appellee.